

1982 WL 189196 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

March 5, 1982

\*1 Mr. Cary D. Chamblee  
Deputy Director  
Land Resources Conservation Commission  
2221 Devine Street  
Suite 222  
Columbia, South Carolina 29205

Dear Cary:

Receipt is acknowledge of your letter of January 7, 1982, in which you have asked the following five questions:

1. What is the personal liability of the soil and water conservation district commissioners (who are responsible for the creation of watershed conservation districts), pursuant to Section 48-13-10 et. seq., S. C. Code of Laws, in the event of failure of watershed structures? What is the commissioner's liability in the event of accidental drowning, personal injury during maintenance, etc.?
2. What is the personal liability of watershed district directors in the event of failure of watershed structures? What is the director's liability in the event of accidental drowning, personal injury during maintenance, etc.?
3. What effects would a dam failure caused by improper maintenance have on questions 1 and 2?
4. Who would be responsible for dam failure caused by inadequate structural design?
5. Who would be responsible for dam failure caused by improper construction practices?

It is my understanding that this request is made in the nature of attorney-client and is not an official request for an Attorney General's opinion. This letter should, therefore, be considered a confidential communication between you and your Commission and me as your attorney. It is not for publication.

In order to answer your questions it is necessary to review the law of official immunity as it presently exists in this State. Public officials who must as a necessary element of their work use discretion and judgment have long been afforded a qualified immunity from suit. [Long v. Seabrook](#), 260 S.C. 560, 197 S.E.2d 659; [Dunbar v. Fant](#), 170 S.C. 414, 170 S.E. 460; 67 C.J.S. Officers, Section 208. The exemption from liability which public officials are accorded in situations involving the exercise of discretion was formulated to prevent the threat of suit from inhibiting the free exercise of judgment in the performance of official duties. Ibid. Section 206.

There are two very important considerations in the official immunity doctrine. First, as I have indicated above, the immunity does not apply to purely ministerial employees. It is only invoked where there is some exercise of discretion. In [Long v. Seabrook](#) the Supreme Court indicated the difference between a ministerial duty and a discretionary one as follows:

'The duty is ministerial when it is absolute, certain and imperative, involving merely execution of a specific duty arising from fixed and designated facts. Quasa-judicial duties are such as necessarily required the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course proceed . . .'

Although you may advise me further on this, I believe the role of a commissioner is inherently discretionary and would, therefore, be entitled to official immunity.

\*2 The second important element to consider is that the official immunity is a qualified immunity. By that I mean the courts have indicated that the officials would be immune from liability if they are not shown to be corrupt, acting in bad faith, or influenced by malicious motives. Based on this standard, it is clear that a commissioner performing his discretionary roll in good faith would be immune from suit.

In my professional opinion, the law as I have described it above is still valid in this State. Therefore, in each of the situations as you have described them above, your commissioners would be immune from liability assuming they were acting in good faith, were not corrupt, and were not influenced by malicious motives. I should close this letter, however, by expressing to you the fact that a great deal of uncertainty has arisen within the legal community because of a recent case. In deciding another proposition of law, our Supreme Court has hinted that it may be ready to change the law. If this is done a great many public officials could be caught short depending on the law as it presently exists. For this reason, I would advise you to obtain liability insurance for your Commission members and other employees. It is my hope that the law will remain as it is, having been based in logic and a recognition on the part of the Supreme Court of the realities of being a public official. However, the presence of liability insurance would be comforting, to say the least, for your commissioners who run the risk of being caught short by a change of the law.

In summary, the answer to questions 1 through 3 is that no liability exists under the present law for the events you described in those three questions unless the public official is corrupt, acting in bad faith, or is influenced by malicious motives. This is, however, subject to change momentarily. In question 4 the liability would appear to be on the part of the designer of the structure with some possible liability being on the contractor. Again, the qualified immunity afforded the commissioners in this situation is subject to change at any time. The answer to question 5 would be similar to the answer to question 4. I clearly see liability on the part of the construction company guilty of improper construction practices. There could also be some liability on the part of the architect for improper supervision. Again, the commissioners would enjoy a qualified immunity in this instance, subject to change at any time. The bottom line in all five questions is to protect yourself, if possible, with insurance.

I hope this has sufficiently answered your questions. If not, please feel free to call at any time.

Sincerely,

Clifford O. Koon, Jr.  
Assistant Attorney General

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